

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PARALLEL NETWORKS LICENSING, LLC,) )  
 )  
Plaintiff, )  
 ) Civil Action  
v. ) 13-2073-KAJ  
 )  
MICROSOFT CORPORATION, )  
 )  
Defendant. )

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Monday, March 13, 2017  
2:00 p.m.  
Courtroom 4B

844 King Street  
Wilmington, Delaware

BEFORE: THE HONORABLE KENT A. JORDAN, U.S.C.C.J.

APPEARANCES:

YOUNG CONAWAY STARGATT & TAYLOR  
BY: PILAR KRAMAN, ESQ.

-and-

McKOOL SMITH, P.C.  
BY: DOUGLAS A. CAWLEY, ESQ.  
BY: CHRISTOPHER BOVENKAMP, ESQ.  
BY: ANGELA VORPAHL, ESQ.  
BY: JOHN CAMPBELL, ESQ.  
BY: KEVIN HESS, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2  
3 FISH & RICHARDSON  
4 BY: JUANITA BROOKS, ESQ.  
5 BY: JASON WOLFF, ESQ.  
6 BY: MARTINA HUFNAL, ESQ.  
7 BY: NITIKA FIORELLA, ESQ.  
8 BY: RONALD GOLDEN, ESQ.

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10 Counsel for the Defendants  
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1 THE COURT: Good afternoon.  
2 Please be seated. Thanks. I have got the  
3 sign-in sheet, but it would be helpful if we  
4 took a moment for some introductions. So why  
5 don't we start with Ms. Kraman, if you would,  
6 plaintiffs.

7 MS. KRAMAN: Good afternoon, Your  
8 Honor. Pilar Kraman for the plaintiff. And  
9 with me at counsel table again is Doug Cawley,  
10 Chris Bovenkamp and Angela Vorpahl. And behind  
11 us is Kevin Hess and John Campbell.

12 THE COURT: Good afternoon. Thank  
13 you very much. Ms. Hufnal for Microsoft.

14 MS. HUFNAL: Good afternoon.  
15 Martina Hufnal. With me is Juanita Brooks,  
16 Jason Wolff, Nitika Fiorella and Ronald Goldman.  
17 And from Microsoft we have Stacy Quan.

18 THE COURT: Thank you one and all  
19 for being here. Let me tell you what, it's  
20 probably no history or secret to any of you that  
21 I spent some time already today with folks from  
22 Parallel Networks this morning. I intend to  
23 kind of follow the same pattern which is tell  
24 you what I have got teed up, ask you if there is

1 anything I'm missing. Start with voir dire and  
2 jury instruction issues and then turn to in  
3 limine motions.

4 But I'll begin by saying is there  
5 anything that outside of those matters that has  
6 to be addressed in this hearing?

7 Mr. Bovenkamp?

8 MR. BOVENKAMP: Not that I'm aware  
9 of, Your Honor.

10 THE COURT: Okay.

11 MS. HUFNAL: There is one  
12 outstanding motion to supplement an expert  
13 report. I'm not sure if Your Honor was going to  
14 hear argument on that today.

15 THE COURT: Yes, I will. That's  
16 to -- which is that?

17 MS. HUFNAL: Parallel Networks'  
18 motion to supplement the expert report for their  
19 damages expert.

20 THE COURT: Yes, we will be  
21 hearing that. Okay. Let's start with the voir  
22 dire jury instruction matters. First off, I got  
23 the requested jury questionnaire. We will not  
24 be using that. Your questions, let me tell you

1       that I have taken a look at those, the jointly  
2       asked questions are fine for voir dire.  
3       Microsoft -- we'll start with Parallel Networks.  
4       Your first question is fine, I'll ask that. All  
5       the others that claim to be overly  
6       argumentative, I won't be asking those.

7               Microsoft, I thought your first  
8       five questions were okay, six through ten were  
9       overly argumentative. I won't be asking those,  
10      so please prepare an appropriate voir dire  
11      question sheet with those rulings in mind.

12             Preliminary jury instructions, the  
13      only thing I saw there that looked to me like it  
14      needed attention was the question about the  
15      conduct of the jury, that was at pages --  
16      beginning at page five, I think. And we're  
17      going to go with the Microsoft's version of  
18      that. I don't want the jury talking about this  
19      case until -- unless and until it gets to them.  
20      So I don't want to imply that they can chat  
21      about the substance of it before that.

22             Now, that point does not need to  
23      be reiterated as it was suggested on page nine,  
24      because it comes up twice. So it doesn't -- let

1 me make sure. At the bottom of page nine it has  
2 got a second -- it's hitting that thing twice  
3 and I don't think that's necessary, so that  
4 should come out.

5 On the final jury instructions, I  
6 really didn't see anything in there that I  
7 didn't think could wait until trial and we see  
8 what comes in.

9 And that brings us to the in  
10 limine motions. And why don't we go to the  
11 question about Mr. Bone. This is defendant  
12 Microsoft's opposition to motion for leave to  
13 file a supplement. Who is speaking to this on  
14 behalf of Microsoft?

15 MS. HUFNAL: I am, Your Honor,  
16 Martina Hufnal.

17 THE COURT: All right.  
18 Ms. Hufnal.

19 MS. HUFNAL: And just to be clear,  
20 this is the opposition to the motion to  
21 supplement the expert report? There is also a  
22 motion on the MIL. I just want to be clear I'm  
23 arguing the right thing.

24 THE COURT: I might be getting

1       this out of order. I apologize. You know what,  
2       let's -- he yeah, I picked up your opposition  
3       first. PNL, Mr. Campbell, do you have got this?  
4       Okay.

5                   MR. CAMPBELL: Good afternoon,  
6       Your Honor. John Campbell for Parallel  
7       Networks. Just so I'm on the right page, this  
8       is the motion to supplement Mr. Bone's testimony  
9       or Mr. Bone's expert report.

10                  THE COURT: Exactly. Thank you.

11                  MR. CAMPBELL: So, Your Honor, I  
12       can -- I'm sure Your Honor has read the papers,  
13       but essentially what we're seeking is leave for  
14       Mr. Bone to file a supplemental report that  
15       addresses the issues where he no longer has a  
16       survey to rely upon. He's gone through and  
17       looked at Microsoft's own documentation. A lot  
18       of this information was in his original report,  
19       some of it was discussed in his original report  
20       and determined that, you know, even without the  
21       survey, he can apply the same methodology, the  
22       same approach, do the same damages analysis, but  
23       use Microsoft's own documentation to do the  
24       apportionments necessary to go from the

1 WindowServer revenue to the WindowServer profit  
2 attributable to the patents. So this is all in  
3 an effort to replace the information that is no  
4 longer available for the survey.

5 THE COURT: Okay. I understand.  
6 Thank you.

7 Ms. Hufnal.

8 MS. HUFNAL: Good afternoon, Your  
9 Honor, Martina Hufnal. On the timeliness, there  
10 are significant time restraints, constraints  
11 with trial coming seven weeks away. I will  
12 address the methodology issue that counsel just  
13 raised. It is not just switching in numbers the  
14 same methodology, the theory behind his  
15 calculations are changing. It is true that in  
16 both cases he starts with total revenue.

17 Before what he did was use a  
18 multiplier to get the IIS percentage and then he  
19 used the Isaacson survey to get the percentage  
20 of IIS that was accused ARR. What he's doing  
21 now is total revenue and use a multiplier to get  
22 ARR down, so we're not even dealing with IIS, we  
23 are going right to the download.

24 And from that he uses a 50 percent



1        number, he says half of the time you're going to  
2        be intelligent load balancing, half not. Now  
3        he's saying we have got these ARR downloads and  
4        half of those are related to the accused  
5        technology and then he uses a different  
6        multiplier to do value on that.

7                But the theory is different. The  
8        numbers are conveniently similar in  
9        multiplication, but the theory which is what we  
10       want to question him on is the rationale, the  
11       theory, is really a new opinion. It is not a  
12       situation where it's just kind of a taking or  
13       questioning the numbers that are used, it's a  
14       new thought process, a new methodology.

15               The prejudice here is significant  
16       to Microsoft in doing pretrial, getting ready  
17       for trial, having to have our not just damages,  
18       but technical expert deal with this because it's  
19       a new analysis all seven weeks before trial.  
20       Fundamental they could have done an alternative  
21       analysis in their opening expert report, so the  
22       harm here is really just self inflicted by  
23       Parallel.

24               THE COURT: Mr. Campbell, anything

1 from you in response?

2 MR. CAMPBELL: If Your Honor has  
3 any questions I'm happy to go through the  
4 methodology to explain what Mr. Bone changed.  
5 We are still seven weeks I think is a long  
6 period of time. They have his supplemental  
7 report, we gave it to them at the time we filed  
8 the motion for leave. So we're done. If they  
9 would like to supplement their reports, we have  
10 no objection to that, we're happy to deal with  
11 that.

12 THE COURT: Thanks. Well, I'm  
13 going to grant the motion and I know it puts a  
14 burden on Microsoft to have to make changes and  
15 consult its experts, but I'll ask for you folks  
16 to provide some kind of a schedule so that there  
17 is an end point. I don't want it dragging out  
18 so I expect the Parallel Networks will make  
19 Mr. Bone available for a deposition at the  
20 convenience of Microsoft's counsel, whenever  
21 that might be.

22 MR. CAMPBELL: Absolutely.

23 THE COURT: And that to the extent  
24 there needs to be some kind of supplemental

1 response from Microsoft's experts, it goes  
2 without saying that I would grant their request  
3 to do that. And there would also be leave for  
4 further deposition by Parallel Networks to the  
5 extent that's necessary to flesh things out.

6 The good news for you guys is you  
7 have excellent lawyers and I figure you can get  
8 this covered. I realize you're on a relatively  
9 short fuse, but so weren't we all in getting  
10 ready for trial.

11 Ms. Hufnal.

12 MS. HUFNAL: Yes, Your Honor.  
13 Because of the difference in the methodology  
14 here and the lack of support for a lot of the  
15 numbers, we would request leave to file another  
16 Daubert.

17 THE COURT: Yes. You can -- the  
18 answer to that is yes, if you have a basis for  
19 saying look, this is new and it's different and  
20 it's not well rooted, you got your shot.

21 MS. HUFNAL: Okay.

22 THE COURT: When I say I would  
23 like to draw a line under this, I mean that. I  
24 don't want to be facing a Daubert motion on the

1       eve of a trial. You have had this document for  
2       a while -- I mean, you haven't had it for all  
3       that long, I think I only issued my opinion  
4       what, a few weeks ago, so it's not even been a  
5       month, so you haven't had it for too long, but  
6       hopefully you have been working and moving and  
7       planning for how you would address this.

8                       To the extent you have got a  
9       Daubert motion, that should get to me so that I  
10      have got at least a couple of weeks before we're  
11      supposed to sit down at a trial to turn that  
12      around. Right? Because this is going to be  
13      pretty darn important in determining what kind  
14      of case, if any, is coming in for the plaintiff.  
15      Right?

16                   MR. CAMPBELL: Yes.

17                   THE COURT: So talk to each other  
18      in good faith, come up with a schedule and get  
19      it to me so that I have got better than a couple  
20      of weeks to address it and still have people  
21      limit the impact on ramping up for a trial that  
22      may or may not have to happen depending on that.  
23      Everybody squared on that? I would like to hear  
24      from you on that by the end of this -- certainly

1 not by the end of this week, but get together on  
2 this and let me know by Wednesday, what's the  
3 schedule that we have got, when can I expect to  
4 have a full set of briefing on a Daubert motion,  
5 which I expect that we are going to be seeing,  
6 and when will we get all of the deposition work  
7 and all that kind of thing done so that there is  
8 nothing left to be done except for trial  
9 preparation. I don't have to worry about that  
10 so much, but I want to know it's over. Does  
11 everybody follow what I'm asking for? So day  
12 after tomorrow let me know when I can expect it.  
13 All right?

14 MR. CAMPBELL: Yes, Your Honor.

15 THE COURT: All right. Thanks.

16 Turning to the in limines, start  
17 with I believe Parallel Networks only had one,  
18 am I right about that?

19 MR. CAWLEY: That is correct, Your  
20 Honor.

21 THE COURT: Who is going to be  
22 speaking to that?

23 MR. CAWLEY: I am.

24 THE COURT: Okay. Mr. Cawley.

1 MR. CAWLEY: Your Honor, Parallel  
2 Networks has basically an investor, a  
3 shareholder who brought financing to them. This  
4 motion in limine seeks to exclude anything other  
5 than I guess during voir dire asking the jury if  
6 anybody knows of that entity, Parabellum,  
7 otherwise there is going to be no witness from  
8 them. I think it's a simple equation of our  
9 motion in limine under Rule 403, the Court first  
10 inquires whether the testimony would make any  
11 pertinent fact in the case more or less likely,  
12 and it would not in this case. So the Court  
13 doesn't have to reach the second prong which is  
14 whether it would be unduly prejudicial.

15 THE COURT: Speak if you would,  
16 please, Mr. Cawley, on the assertion that they  
17 make in their response that ownership is  
18 relevant to other issues about the history of  
19 the development of the patents-in-suit and  
20 attempt to make Parallel Networks appear to be  
21 an entity that's practicing the patents. Those  
22 past and present ownership relevant to rebut  
23 showings of commercial success. Can you speak  
24 to those issues?

1 MR. CAWLEY: Yes, Your Honor.

2 First of all, commercial success  
3 is a questionable relevance once we're not  
4 dealing with obviousness. But we're not asking  
5 that the Court prohibit any inquiry into who the  
6 previous owners were, and to what they did. The  
7 issue here is does that reach into the identity  
8 of a shareholder of the current owner, Parallel  
9 Networks. There is not going to be any dispute  
10 that Parallel Networks is a licensing company.  
11 It's made some incipient efforts to get into  
12 business, but those have not been successful to  
13 this point. All of that is fair game.

14 What we think is not relevant to  
15 the truth or falsity of any relevant fact at  
16 issue is whether there is an investor,  
17 Parabellum, which has brought financing to  
18 Parallel Networks.

19 THE COURT: I got you. Thanks  
20 very much, Mr. Cawley.

21 Who is responding on this?

22 MS. FIORELLA: I am, Your Honor.

23 THE COURT: Ms. Fiorella.

24 MS. FIORELLA: Good afternoon,

1 Your Honor. Microsoft feels that it is  
2 relevant. And Parallel has not shown any  
3 prejudice, they only argue relevance.

4 THE COURT: I think it's a better  
5 than straight faced argument to say they're just  
6 trying to get the jury to not like us based on a  
7 shareholder who finances litigation associated  
8 with patent portfolios. This is a not very  
9 thinly veiled effort to say these guys are bad  
10 trolls, don't listen to them. Now, that  
11 certainly seems to be the implication of what  
12 you're trying to do, isn't it?

13 MS. FIORELLA: No, Your Honor.  
14 First, it's really only -- the main relevance  
15 here is to just show the jury who the real  
16 parties in interest are.

17 THE COURT: What does it matter  
18 about -- what does the ownership interest of  
19 Parabellum have to do with any issue that's in  
20 the case? That's what I guess we ought to start  
21 with.

22 MS. FIORELLA: So the two issues  
23 that we bring up in our briefing is the history  
24 and development of the patent and the commercial



1       success. Obviousness is still an issue here, so  
2       commercial success is still an issue. And with  
3       respect to Parallel Networks assertion that  
4       everything, all the predecessors are still fair  
5       game, it doesn't really make sense to stop the  
6       story. So if they're going to be talking about  
7       InfoSpinner, all the different entities to which  
8       the patents had changed hands over the years and  
9       just stop and say Parallel Networks that's it,  
10      and tell the jury that's it, it's not.

11               THE COURT: Why isn't that it?  
12      Does Parabellum own the patents?

13               MS. FIORELLA: It owns a  
14      percentage of the patents.

15               THE COURT: It owns -- do I  
16      understand correctly that Parabellum owns a  
17      share of Parallel Networks?

18               MS. FIORELLA: There is a -- yes,  
19      it owns a share of Parallel Networks who owns  
20      the patents.

21               THE COURT: Well, that's a  
22      distinction with a difference; right?

23               MS. FIORELLA: There is still  
24      ownership interest in the patents, the asserted

1 patents that Parabellum holds.

2 THE COURT: How is there an  
3 ownership interest other through the ownership  
4 that it has in Parallel Networks? Does it own  
5 the patents, forget Parallel Networks, does  
6 Parabellum have an ownership interest other than  
7 through Parallel Networks?

8 MS. FIORELLA: I do not believe  
9 so.

10 THE COURT: Okay. Well, I'm going  
11 to grant the motion in limine, then. I think on  
12 balance the 403 argument is persuasive to me. I  
13 don't see how it's relevant to any issue in the  
14 case. That doesn't prevent -- and I think I  
15 heard him concede this, that doesn't prevent you  
16 from talking about the ownership of the patents,  
17 how that's changed hands over time, you're  
18 perfectly free to do that, but Parabellum, it's  
19 a shareholder as far as I'm concerned, based on  
20 what I have heard and read, it has nothing to do  
21 with the case. It's meaningless to any issue  
22 the jury is going to hear. That one is granted.

23 MS. FIORELLA: Thank you, Your  
24 Honor.

1 THE COURT: Microsoft's first  
2 motion in limine, who has got that?

3 Mr. Wolff.

4 MR. WOLFF: Jason Wolff, Your  
5 Honor.

6 Our argument is that -- you read  
7 the brief, how about if I respond to theirs.  
8 Parallel cites three cases that say that the  
9 outcomes, or they say that the reexamination  
10 history should come in from the post grant  
11 proceedings. They are the Stone Eagle case, the  
12 Universal Electronics case and the Oracle case.  
13 And every one of those cases the reexamination  
14 proceedings had completed. There was nothing  
15 further to be done. And those, in two of those  
16 cases, in the Stone Eagle case and in the  
17 Universal Electronics cases, they were  
18 terminated and the petitions that had instigated  
19 those things had been denied, the petitions  
20 themselves had been denied, so there was no  
21 appeal, everything was over.

22 In the third case, in the Oracle  
23 case there were two issues -- I'm sorry, three  
24 patents at issue there, all were subject of

1 reexamination proceedings. In two of those  
2 reexamination proceedings they had been  
3 terminated, there was no further appeal,  
4 everything was completely done. In the third,  
5 the reexamination proceeding was continuing and  
6 the judge in the Oracle case said that one is  
7 not coming in, it's not done. That's exactly  
8 what's happening here. The IPR's that were  
9 filed are continuing, they're on appeal and  
10 they're not done yet. And allowing the jury to  
11 consider the findings or the final written  
12 decision of the PTAB is encouraging them to not  
13 have to do anything with the invalidity  
14 arguments in front of the court.

15 Parallel has a couple of  
16 arguments, they say why this should come in,  
17 they say it's relevant because they want to put  
18 context in, but the final written decision  
19 hadn't come out when Parallel made its arguments  
20 to the patent office, so if statements or  
21 evidence proffered by either side, it should be  
22 fair game, those are things that should be  
23 allowed into the case, statements contrasting  
24 issues that are being litigated, but the final

1 written decision, it just shouldn't be there.

2 It's not done. It's not terminated.

3 They have a couple of arguments  
4 they make about that they want to be able to say  
5 that the reexamination outcome shows that it was  
6 a high probability of validity. This is exactly  
7 why we're saying it shouldn't come in. They  
8 want to say that that Parallel will be unable to  
9 point out that Microsoft chose not to raise its  
10 own prior art at the patent office. Well, we  
11 couldn't. It's a system. You can't raise  
12 system prior art. This is another reason why  
13 all this stuff coming in and all these extra  
14 arguments they want to make about conclusions to  
15 reach makes it so you have to instruct your jury  
16 this is what happens in the IPR and this is what  
17 is different here, this is what is different  
18 there, it's unduly prejudicial.

19 THE COURT: I got you, Mr. Wolff.  
20 Who has got the ball for Parallel  
21 Networks?

22 MR. HESS: Kevin Hess for the  
23 plaintiff.

24 I think our main problem with

1 Microsoft's MIL as crafted is that they want to  
2 be allowed to reference arguments made during  
3 the IPR regarding claim scope or statements made  
4 that are inconsistent with the parties' position  
5 in this case.

6 THE COURT: Yes, I read your  
7 shield and sword thing. Help me understand  
8 this. Is there not a meaningful difference  
9 between the sort of thing that we think of as an  
10 estoppel, a judicial estoppel, that is you don't  
11 let people say things different in one form than  
12 they said in another form and the idea that  
13 you're going to bring in everything that  
14 happened in that other forum. I'm not seeing  
15 that as a sword and shield problem, Mr. Hess. I  
16 see judicial estoppels all the time and nobody  
17 says if we're estopped, then everything from  
18 that other discussion should be fair game to  
19 come in.

20 MR. HESS: I think we would be  
21 attacking the fact that estoppel even applies  
22 here. We're attacking the premise that there  
23 even were inconsistent statements made at IPR.  
24 Both the Court here in its ruling on claim

1 construction found that Parallel made no  
2 narrowing arguments at IPR, and in fact PTAB  
3 itself weighed this very issue in the final  
4 decision.

5 THE COURT: So you ought to be  
6 very happy with that. Do you have anything that  
7 meets Mr. Wolff's argument that this would  
8 really complicate matters for the jury to try to  
9 understand what the rules are that govern inner  
10 parties review and keep that straight in their  
11 heads while they're trying to figure out the  
12 technical arguments and the legal arguments that  
13 you're making in this court?

14 MR. HESS: I think we could draft  
15 up some jury instructions on this issue and feel  
16 pretty confident the jury could understand that  
17 there was some other proceeding. It does not  
18 have a binding effect on their decision, but  
19 their bind might be persuasive, there are cases  
20 out that there PTAB can be persuasive in a  
21 district court proceeding.

22 THE COURT: I don't have any lack  
23 of confidence in your abilities, but I do lack  
24 confidence in the outcome that you described,

1       that is that the jury won't have a problem with  
2       this, I think it's more prejudicial than  
3       probative and I grant the motion in limine.  
4       We're not going to get into the inner parties  
5       review.

6                       To the extent there are statements  
7       that can be cross-examined on because they were  
8       said under oath, a witness will face his or her  
9       own words just as they would if they had said  
10      them in a deposition or something like that.  
11      But the fact that there was a IPR and the  
12      outcome of that, that's not fair game.

13                     MR. HESS: Understood. Just for  
14      clarification, does that also include statements  
15      made in a declaration?

16                     THE COURT: Yes, if the  
17      declaration is made under oath, so they are  
18      going to get cross-examined on it. If somebody  
19      thinks they can make hay of it, you guys will be  
20      on your feet if you think they're unfairly using  
21      something just the way it would be if they were  
22      unfairly using a deposition. We'll deal with  
23      that if and when we deal with it. They can use  
24      those declarations, but we're not going to get



1 into the fact that there was an IPR.

2 Microsoft number two, and this is  
3 something that probably shouldn't surprise the  
4 people from Parallel Networks. We kind of  
5 covered this this morning. In the interest of  
6 time, you're about to win, so unless you really  
7 want to say something, you should probably stay  
8 seated.

9 I just -- based on Knorr-Bremse,  
10 Section 298, I don't think the fact that they  
11 did or didn't get opinions is either here nor  
12 there. That does not mean that there can't be  
13 an opening of the doors as you folks  
14 acknowledged in your papers, you can say things  
15 that they in good faith may say to me, Judge,  
16 they have opened this up and we're going to deal  
17 with it.

18 Now, having said that, I fully  
19 expect if we have a trial, we'll be arguing  
20 about this at side-bar, not even at side-bar, I  
21 expect we'll be arguing about it while the jury  
22 is not in the box at break, because somebody is  
23 going to ask something of a Microsoft witness  
24 that undoubtedly Parallel Networks will say

1 well, that opened the door. So maybe I'm just  
2 kicking the can down the road, but as a general  
3 proposition without knowing what's coming in,  
4 because the I don't know the questions and  
5 answers yet, I'm saying I'm granting that motion  
6 in the abstract, it's got nothing to do with the  
7 case. In the heat of the discussion, might a  
8 door be opened? Yes. And I'll deal with that  
9 if and when I have to deal with it. All right?

10 Microsoft motion in limine number  
11 three, who has got the ball on that one?

12 MR. GOLDEN: I do, Your Honor.

13 THE COURT: All right.

14 Mr. Golden, while you're getting ready to talk  
15 about this, can you just answer me right from  
16 the get go whether this was a matter that was  
17 brought before Judge Robinson at all? Is there  
18 a back story here?

19 MR. GOLDEN: Yes, Your Honor,  
20 there is a back story. I think it was October  
21 of 2015, a little bit before my time, the  
22 parties had a joint status conference with IBM  
23 about this. Parallel sort of says in passing  
24 that Judge Robinson decided this as it related

1 to Microsoft, but when I checked the transcript  
2 it appears that she made sort of somewhat of a  
3 definitive ruling toward IBM, but left this sort  
4 of open ended in the context that the parties  
5 were intending to file Daubert motion challenges  
6 the Isaacson survey. So what I actually would  
7 turn to with that said is the fact that even  
8 though the universe has shifted a bit with you  
9 having just granted the motion for leave and  
10 giving us the opportunity to respond to the  
11 Daubert motion, we actually put in our summary  
12 judgment brief for no infringement that even  
13 their own technical expert actually admits that  
14 I think he says it certainly wasn't a focus,  
15 that is in the context of outside sales he does  
16 not believe that if anyone downloaded a copy of  
17 ARR in Brazil that it would meet any of the  
18 claims.

19 So essentially what we have is a  
20 late filed report after the expert rebuttal  
21 report discovery deadline, Parallel's  
22 infringement expert saying that these sales are  
23 not even relevant to what's being asserted in  
24 the case, and it's essentially prejudicial to

1 Microsoft because it appears that they're just  
2 trying to add more money to their damages  
3 number.

4 THE COURT: Have you had this  
5 report since 2015?

6 MR. GOLDEN: We have. When they  
7 did not ask the Court for leave to serve it  
8 after they were previously denied twice leave to  
9 include this information in their expert report.

10 In fact just before that, there  
11 was another discovery dispute before Magistrate  
12 Judge Fallon in which the main subject of it was  
13 whether Microsoft should have to produce a  
14 witness under 30(b)(6) for a deposition and in  
15 denying that they also denied their request to  
16 file the supplemental expert report or what we  
17 refer to it as the untimely report.

18 THE COURT: Okay. Thanks very  
19 much, Mr. Golden.

20 Who is speaking on behalf of  
21 Parallel Networks?

22 MS. VORPAHL: Good afternoon.  
23 Angela Vorpahl for Parallel Networks, Your  
24 Honor. As you pointed out, Microsoft has had

1       this report since September of 2015 and it did  
2       come up in the October of 2015 conference on  
3       expert testimony when Judge Robinson ruled on  
4       which Daubert motions would be allowed and which  
5       wouldn't. In that hearing, she recognizes that  
6       Mr. Bone's supplemental report was only four  
7       pages long, takes his methodology that he  
8       applies to US sales and all he does is take  
9       outside US sales information from Windows Server  
10      and applies it to the technology. She says  
11      here, "I mean, that does not sound unreasonable  
12      to me. They had a theory. They asked for  
13      information. You didn't give it. They found  
14      it. They added numbers consistent with what  
15      they already had in their report." At the end  
16      of the day, she did not permit a Daubert motion  
17      on this.

18                   THE COURT: Well, I think actually  
19      the most significant thing might be what  
20      Mr. Golden said right at the jump, which is  
21      accurate, that the ground has shifted under you  
22      based on my ruling with respect to them having a  
23      chance to supplement Dr. Bone's report again,  
24      and you all having a chance to file a Daubert

1 motion with respect to that. So if you want to  
2 include in your Daubert arguments an argument on  
3 this, I'll let you do it. You're going to be  
4 taking a crack at it. But I'm not ruling in  
5 limine that they can't do it. You take it up in  
6 the context of what we're dealing with, we have  
7 thrown expert stuff a little bit up in the air  
8 and you'll have a chance to shoot at it now.  
9 All right.

10 But as for an in limine motion  
11 right now, it's denied without prejudice to what  
12 we have just discussed.

13 Microsoft's number four,  
14 Ms. Brooks.

15 MS. BROOKS: Thank you, Your  
16 Honor. And I didn't want to interrupt the  
17 Court, but to go back on the preliminary  
18 instructions, there was one other issue which is  
19 the glossary, and we had objected to -- Parallel  
20 had proposed a glossary at the end of the  
21 preliminary instructions and we had objected to  
22 that. I don't know if Your Honor wants to deal  
23 with that now or later, but there was that one  
24 other issue.

1 THE COURT: Thank you for pointing  
2 that out. I hadn't picked up that there was  
3 that objection. Let me take it in two parts.  
4 First, assume I were a client to say go ahead  
5 and they can have a glossary, is there anything  
6 about the definitions in the glossary that are  
7 troubling to you in specific?

8 MS. BROOKS: The two things that  
9 are in there based on Your Honor's ruling  
10 regarding the reexamination, they have a  
11 definition of reexamination history and inter  
12 parties review history, or IPR history, so we  
13 would definitely object to those as causing jury  
14 confusion since that will not be before the  
15 jury.

16 The rest of them are all benign.  
17 Our only concern is this is dealt with in the  
18 FJC video, whether this is going to place undue  
19 emphasis on these terms, I don't know, but we  
20 wouldn't have strong objection to the rest of  
21 them, but those two we do.

22 THE COURT: The IPR stuff is out  
23 and I'm not sure the reexamination comes in for  
24 any other reason, does it? Is there some reason

1 Mr. Bovenkamp, that a reexamination is relevant  
2 at all?

3 MR. BOVENKAMP: Yes, Your Honor, I  
4 do believe the reexamination is relevant just  
5 like the prosecution history of the patent is  
6 relevant to give the jury the background as to  
7 what has happened and in this case there are  
8 references that were considered during the  
9 reexamine that are still at issue.

10 THE COURT: But you don't have to  
11 reference a reexamine to make that point. But  
12 you know what, leave it out of the glossary.  
13 And so those two things are out of the glossary.  
14 And I don't see a problem with them having a  
15 glossary of terms otherwise. Okay?

16 Thanks, Ms. Brooks, for getting to  
17 that.

18 MS. BROOKS: Thank you, Your  
19 Honor. Now back to motion in limine four. I  
20 would just address directly their opposition to  
21 it. This deals with the E-mail that Mr. Focus  
22 to Ms. Quan that we say is impermissible under  
23 two grounds, one is the nondisclosure agreement  
24 that was in place, the confidentiality agreement



1       that was in place at the time and two, under  
2       Rule 408. What Parallel Networks argues is that  
3       even if its admission is prohibited by the  
4       agreement that had been entered into, the NDA  
5       agreement, it's admissible to show willfulness.

6               Now, first of all, in an  
7       interrogatory response that we filed on February  
8       20th of 2015, Microsoft said, "Microsoft further  
9       responds that Microsoft first became aware of US  
10      patent numbers '335 and '554 as originally  
11      issued prior to the invalidation and the  
12      abandonment of all then issued claims in 2006."

13              So in other words, we are  
14      admitting that we had notice of these patents  
15      since 2006.

16              THE COURT: Then explain to me  
17      what is it about this very short E-mail, I just  
18      -- I guess I am clueless. Why are we battling  
19      so hard about this?

20              MS. BROOKS: It's the second part  
21      of it, Your Honor. I need my reading glasses  
22      for this. It's the second paragraph, Your  
23      Honor. It says, "I have also attached a claim  
24      chart mapping claim 30 from the certificate of

1 correction of the '335 to Microsoft's  
2 application request routing architecture." And  
3 then, Please don't hesitate to contact me, et  
4 cetera.

5 So what Parallel Networks intends  
6 to do by this is argue willfulness. If you look  
7 at the top of the E-mail, it specifically is  
8 marked by Mr. Focus as FRE 408. And so they are  
9 not allowed to use 408 discussions that are  
10 protected under 408 to show liability and that's  
11 exactly what they want to do.

12 And unfortunately what this also  
13 does is it opens up the door to well, what was  
14 Ms. Quan's response to Mr. Focus about this, and  
15 what was Mr. Focus's response back. So they're  
16 going to try to argue that as of 2012 we new we  
17 were willfully infringing because they sent us a  
18 claim chart on one claim, claim 30 of one of the  
19 patents at issue in this case. And that's  
20 clearly just prohibited under the rules for all  
21 the reasons that the mischief that can be made  
22 with that.

23 THE COURT: Thanks, Ms. Brooks.  
24 Who has got this discussion.

1 Mr. Hess.

2 MR. HESS: So as an initial  
3 matter, Your Honor, Rule 408 doesn't apply here  
4 because, you know, as you know, it's to prove or  
5 disprove the validity or amount of a disputed  
6 claim. There was no disputed claim at the time  
7 of those communications.

8 THE COURT: They were -- when you  
9 say there was none, even if those Texas actions  
10 had been dismissed, these folks were talking not  
11 because they liked each other and because they  
12 just wanted to get together, it was because  
13 there was a concern about ongoing litigation and  
14 disputes, wasn't it? What other explanation was  
15 there for this document except that they had a  
16 dispute, even if there wasn't a specific  
17 litigation to which it was attached at that  
18 particular moment in time? What reason would  
19 exist for having this communication at all but  
20 for the existence of a dispute?

21 MR. HESS: As Mr. Focus admitted,  
22 they were in furtherance of settlement  
23 negotiations.

24 THE COURT: Then why doesn't 408

1 just tell us pretty directly, bad idea to let  
2 that in?

3 MR. HESS: As we understand it,  
4 Rule 408 is limited to prove or disprove the  
5 validity or the amount of an active claim. At  
6 this point in time there was no active claim.  
7 Putting aside the issue of Rule 408 --

8 THE COURT: How can you put that  
9 aside?

10 MR. HESS: I want to make a point  
11 on notice as opposed to willfulness. There is a  
12 damages requirement under the marking statute  
13 that we show notice of the patents. And we're  
14 using this communication as the first date of  
15 notice.

16 THE COURT: They said -- now, for  
17 willfulness purposes, perhaps they're saying  
18 only -- I don't know, they can speak to it, but  
19 I thought I heard Ms. Brooks just say we have  
20 admitted we knew about these in 2006.

21 MR. HESS: No. To extent there is  
22 not going to be an issue as to notice or the  
23 date of notice based on this communication, then  
24 I think we're fine with keeping this exhibit

1 out, unless Microsoft comes back and says that  
2 Parallel Networks did not contact or reach out  
3 to Microsoft before filing the lawsuit.

4 THE COURT: Why don't you stay  
5 right there, Mr. Hess, and I'll ask Ms. Brooks  
6 to stand up at the table. Did I understand you  
7 right when you said we admit we had notice of  
8 this in 2006?

9 MS. BROOKS: Correct, Your Honor,  
10 we had filed an interrogatory response to that  
11 effect.

12 THE COURT: I think you're good.  
13 I'm granting the motion. I think it's a 408  
14 problem, so the E-mail is not coming in. But  
15 you have got your notice admission, and you can  
16 run to town with that. Okay?

17 Ms. Hufnal.

18 MS. HUFNAL: Your Honor, Microsoft  
19 filed a motion for leave to file a fifth motion  
20 in limine just last week. If I could address  
21 that with the Court.

22 THE COURT: You can.

23 MS. HUFNAL: Thank you, Your  
24 Honor.

1                   So this motion, as to the  
2                   timeliness, I think the only substantive  
3                   response that Parallel set out was that all  
4                   motions in limine are supposed to be in the  
5                   pretrial order and we certainly recognize and  
6                   put four of our five motions in limine in there.  
7                   The reason we moved to file our fifth after the  
8                   pretrial order was because in the interim, two  
9                   things happened, Your Honor ruled on summary  
10                  judgment Daubert, and then we had a meet and  
11                  confer with Parallel Networks where we were a  
12                  little surprised by their responses as it  
13                  related to whether or not total revenue of  
14                  Windows Server should come in before the jury.

15                  So after Your Honor ruled on the  
16                  Isaacson survey coming out, we approached  
17                  Parallel Networks we said as a result, the total  
18                  revenue number should be out because you have no  
19                  way to apportion. I'm putting aside because of  
20                  Your Honor's ruling today the second half of our  
21                  motion in limine is moot because they now have  
22                  an opportunity to do an apportionment analysis  
23                  with Mr. Bone's new opinion.

24                  The first half, however, which

1       came to light in light of this discussion is  
2       still relevant, and that is Parallel's position  
3       that they have a direct infringement theory  
4       against Microsoft for Microsoft simply having,  
5       actually making the IIS and the ARR, even though  
6       they exist on two separate servers.

7               So I want to take one step back  
8       because there are several theories of  
9       infringement that have been vetted throughout  
10      this case and that is indirect infringement  
11      against Microsoft for its customers use of ARR  
12      with IIS to do the accused methods and then the  
13      computer readable software claims as well.  
14      Certainly vetted.

15             There is a direct infringement  
16      claim against Microsoft for Microsoft's use of  
17      IIS with ARR in support of its websites. Those  
18      are the accused websites, direct infringement.

19             There is also in the expert  
20      report, and I'm happy to show it to Your Honor,  
21      a statement where their expert says we  
22      internally used and tested, so they have a  
23      direct infringement claim against Microsoft for  
24      the testing of IIS and ARR, there is no damages

1 theory based on that claim.

2 What was never disclosed or  
3 argued, articulated by their expert was what  
4 they are now trying to say, and for the first  
5 time have laid out in this opposition to the MIL  
6 which is the relevant infringement theory is  
7 based on Microsoft's making of Windows Server  
8 and ARR. That was not disclosed and we were  
9 surprised to learn that they were still  
10 asserting a direct infringement theory that  
11 would result in the server, Microsoft Server  
12 numbers coming in front of the jury.

13 So Your Honor, this is from their  
14 expert report, an excerpt from the appendix of  
15 their expert report. The whole section called  
16 Acts of Infringement under 271(a), direct  
17 infringement, and it goes on to explain what  
18 those theories are for IIS and ARR, and the  
19 first is basically a catch all sentence.

20 Then, Your Honor, he says, I  
21 described the infringement of IIS servers and  
22 ARR previously installed, that's the user. I  
23 described IIS with ARR installed internally for  
24 Microsoft. That's the website. And he goes on,



1 and the next two paragraphs, and Your Honor,  
2 this document is attached to Parallel's  
3 opposition, DI-375, the declaration in support  
4 thereof, DI-376, and after talking about the  
5 websites, paragraph 213, which is the last  
6 paragraph in this direct infringement section,  
7 says Microsoft also uses IIS and ARR via its  
8 internal use and testing.

9 That word making, that theory of  
10 Microsoft directly infringing just by having  
11 over here on one server in Washington state the  
12 IIS code and another server in Puerto Rico the  
13 ARR code, so two separate products and the  
14 claims are directed to the combination, but  
15 they're saying we directly infringe just by  
16 having these, we certainly would have moved for  
17 summary judgment as a matter of law on that  
18 issue had we known that it was in the case, but  
19 this is a new development in light of Your  
20 Honor's taking Windows Server out of the cases  
21 for direct infringement.

22 So our motion in limine is to  
23 preclude them from introducing -- this is now  
24 another late theory that we would have to deal

1 with in the case.

2 Thank you, Your Honor.

3 THE COURT: Okay. I got you.

4 Let's just deal with one part right here. I'm  
5 granting the motion to hear your motion in  
6 limine number five. All right? And you have  
7 addressed the substance of it.

8 Who is going to respond to the  
9 substance?

10 MR. BOVENKAMP: I will, Your  
11 Honor.

12 Well, it's not coming up, but let  
13 me --

14 THE COURT: I hope I have  
15 communicated to you guys effectively I'm aware  
16 of your arguments, I have been paying attention,  
17 I got the brief right in front of me.

18 MR. BOVENKAMP: What I wanted to  
19 put up to address the last point that was made  
20 first was just the nature of what's claimed so  
21 we're all on the same page about that, because I  
22 don't know that was necessarily fully briefed.

23 So this is the preamble to the  
24 computer readable medium claims as we call them.

1 And the point was made to Your Honor by  
2 Ms. Hufnal, there is this one piece over here  
3 and this one piece over there. How is that  
4 possibly something that infringes? Well, it's  
5 because the claim in its plain and ordinary  
6 meaning allows that read to be made on their  
7 software.

8 THE COURT: Here is the thing, I'm  
9 not really focused on the merits of this, I'm  
10 not treating this like a summary judgment  
11 motion, I have got in front of me a motion in  
12 limine which says specifically this is coming  
13 out of left field. They didn't put it in this  
14 case. This is a response to the Court's ruling.  
15 They're trying to pull Windows Server back into  
16 it because it means big numbers for them, don't  
17 let them do it, it's not fair, it's not right.  
18 She said it more eloquently than that, but  
19 that's what you need to do.

20 MR. BOVENKAMP: Fair enough. This  
21 is from the body of Dr. Jones' report. This is  
22 paragraph two. I don't know how more clearly he  
23 could say it here in the sentence I have  
24 bracketed. "Microsoft directly infringes based

1       upon operation and or sales of Windows Server  
2       including IIS and ARR components." So right  
3       there he's identifying that. If you track  
4       through that language, making of the accused  
5       products. So in his introduction to his report,  
6       there is no bones about the fact that he is  
7       arguing that direct infringement includes their  
8       making of the accused product.

9               Let's go forward. So this is the  
10       part that Ms. Hufnal also referenced. This is  
11       in the page before is this acts of infringement  
12       section. So at this point he's gone through all  
13       the analysis of the software, et cetera, and he  
14       says this, "Microsoft," -- and she characterized  
15       this as boilerplate, but he says, "Microsoft has  
16       and continues to make IIS and ARR," et cetera.  
17       So again, we have that same statement made.

18              Drop down to 211, I'll skip over  
19       everything except what I have underlined. It  
20       states, "Microsoft writes the code for IIS and  
21       Application Request Routing and places this code  
22       on its own servers."

23              Okay? That's them writing the  
24       code that we analyzed, Dr. Jones analyzed,

1 writing the code for ARR, placing it on their  
2 servers. That's the making. That's him  
3 disclosing what the theory is.

4 Let's go and take a look at claim  
5 20. There is argument by Microsoft that claim  
6 20, it just regurgitates, that's the machine  
7 readable claim, it just regurgitates what was  
8 said for the other claims, but that's not true.  
9 Claim 20 directed to machine readable medium,  
10 Microsoft IIS and ARR software products are  
11 embodied on machine readable medium as stored  
12 sequences of instruction. For example, IIS is  
13 included in Windows Server clients and ARR  
14 downloaded for Microsoft Redmond Data Center.

15 So they may disagree about whether  
16 that's true or not, but he unequivocally says  
17 here and other places that we have just gone  
18 through, that they're making, their placing of  
19 that code on servers is an act of infringement.

20 So for them to act like they're  
21 surprised by this, I mean, I understand why  
22 they're doing it, but his report can't be  
23 clearer as far as addressing and arguing that  
24 direct infringement based upon making, based

1       upon placing that code on the server, is an act  
2       of infringement.

3               THE COURT: Well, it probably  
4       could be clearer. That's really not the point.  
5       The question is, is it clear enough? And I take  
6       your argument.

7               Okay. Ms. Hufnal.

8               MS. HUFNAL: Your Honor, so  
9       paragraph two and paragraph 210 that counsel  
10      showed you, the kind of catchall statutory  
11      language about direct infringement, again, there  
12      is an allegation of direct infringement for  
13      Microsoft using IIS and ARR to support its  
14      websites, so in that -- that language doesn't do  
15      anything to distinguish or identify for us that  
16      there is some other direct infringement -- and  
17      the website, that was clearly pages and pages of  
18      expert reports dealt with that, damages theory  
19      addressed to that. There was nothing in those  
20      catchall phrases that tells us there is some  
21      other direct infringement theory based on just  
22      the making of the Windows Server.

23              THE COURT: When you say there was  
24      nothing to tell us that, respond directly, other

1       than saying that's boiler plate or those are  
2       catchall phrases, when they say they make it,  
3       they write the IIS code and they import the ARR  
4       code from Redmond, Washington, if I'm  
5       remembering that correctly, Mr. Bovenkamp says  
6       that's it, that's a statement of infringement  
7       and it's in his report and if they wanted to  
8       move on it, they could have moved on it, what's  
9       your answer to that?

10               MS. HUFNAL:   Okay.   So I have two  
11       answers.   First, in terms of -- well, let me  
12       start with this machine readable media, because  
13       that's the paragraph 164 that he's showing you,  
14       they're relying on claim 20, there is two other  
15       machine readable claims, but in the report just  
16       to relate back to this discussion here, it's  
17       really about disclosure and fair notice to us to  
18       be able to respond.   So this paragraph that  
19       Mr. Bovenkamp showed you, paragraph 164, we  
20       agree that IIS is on a machine readable media,  
21       it's on a server at Microsoft.

22               And ARR we agree it's downloaded  
23       from our Redmond data server, those are factual  
24       statements.   He goes on to talk about Bing and

1 Front Door and those are the websites.

2 Your Honor, the next page, these  
3 are all kind of factual statements, the next  
4 page where he talked about element 20(a) where  
5 he's now doing his analysis, the accused machine  
6 readable mediums discussed in this report, there  
7 are a sequence of instructions that caused the  
8 Microsoft computer systems to route requests.  
9 This is what their expert was doing his  
10 infringement analysis on. When you put IIS and  
11 ARR and you do this computer system with page  
12 servers, that is what he is analyzing. When I  
13 went on the computer system it's on the machine  
14 readable media, but there was never a statement  
15 that back sitting on the shelves at Microsoft  
16 that in two different data centers or two  
17 different servers, that just making is an act of  
18 infringement.

19 There is no damages theory based  
20 on that, either. The damages theory is all on  
21 the use by the customers.

22 If I may, Your Honor, to support  
23 our position of our true surprise on this, in  
24 Microsoft's brief in support of its motion for



1 summary judgment which is DI-288, we set out for  
2 example, Windows Server is an operating system.  
3 It is not alleged to infringe in its own right.  
4 These were statements. We didn't move on this,  
5 because we had no idea that this was theory.  
6 Windows Server when running IIS with the ARR,  
7 that is what is accused to infringe. We put  
8 this in our summary judgment motion.

9 In response, Parallel Networks  
10 never disputed that. They never brought up the  
11 theory of oh, yes, when the server is accused to  
12 infringe. In fact, they jump right to -- this  
13 is Parallel Networks's brief DI-312, Dr. Jones  
14 provided multiple basis for his findings of  
15 direct infringement by Microsoft's customers.

16 This is not something -- they  
17 definitely could have raised and put us on  
18 notice, we would have raised this in a summary  
19 judgment if we had notice.

20 One final point, Your Honor, if  
21 there were any doubt, we asked their expert,  
22 their technical expert at deposition, I have an  
23 excerpt here on the backdrop of the United  
24 States, but we asked him, does Windows Server as

1 packaged or distributed by Microsoft and before  
2 it's installed on the computer satisfy the claim  
3 on the patents of the asserted claims? Well, as  
4 a method claims that the software can't -- I  
5 don't know if the word is computer readable  
6 media, but for those claims my recollection is  
7 on its own, no, but I would need to look back.

8 We had no notice of this. Even if  
9 it's somehow buried in their expert report and  
10 we asked their expert about it and he said no,  
11 they don't, this is incredibly unfair for them  
12 to be morphing now a theory of direct  
13 infringement to be bringing these large damages  
14 numbers.

15 THE COURT: Why don't you stay  
16 right there for a minute.

17 Mr. Bovenkamp, I'm going to ask  
18 you to respond to the assertion that there is no  
19 damages theory associated with this, even if you  
20 had this, there is nothing to support the  
21 damages associated with this.

22 MR. BOVENKAMP: Right. So with  
23 regards to that, Your Honor, if you go to --  
24 this is attached to our -- I think opposition to

1 Microsoft's motion for leave to submit the MIL,  
2 section 5.1 of the report, there is an entire  
3 analysis on Microsoft's distribution sale of the  
4 accused products, among other things.

5 THE COURT: What exhibit are you  
6 looking at?

7 MR. BOVENKAMP: Let me get it to  
8 you. This is our opposition.

9 THE COURT: I'm holding it.  
10 That's got all the exhibits; correct?

11 MR. BOVENKAMP: Right.

12 THE COURT: Which exhibit is it?

13 MR. BOVENKAMP: Let me flip  
14 through here and make sure I have got the right  
15 one. It is Exhibit 4.

16 THE COURT: They're lettered for  
17 me. Is that exhibit D, expert report of  
18 Dr. Mark Jones?

19 MR. BOVENKAMP: Yes.

20 THE COURT: Okay.

21 MR. BOVENKAMP: And then it's  
22 Section 5.1 of his appendix.

23 THE COURT: All right. So we're  
24 in DI-376, Exhibit D, and for me, that is a

1 one-page document. And it says 1.1, Summary of  
2 Opinions. Have I got the wrong thing?

3 MR. BOVENKAMP: Yes. I'm sorry.  
4 It is Exhibit 4. So this is attached to our  
5 response -- this is attached to 376.

6 THE COURT: I'm holding 376 in the  
7 form you gave it to me. It's got Exhibits A, B,  
8 C, D, E, F and G. Now, I acknowledge being  
9 technologically challenged, but I don't see  
10 Exhibit 4 here, so I don't know what you're  
11 talking about.

12 MS. KRAMAN: May I approach, Your  
13 Honor, and take a look what you're holding and  
14 make sure it's the same thing.

15 THE COURT: I'll hand it to the  
16 clerk. This is marked as DI-376.

17 MR. BOVENKAMP: It should have  
18 Justin's declaration. I don't know how the  
19 numbering got off.

20 MS. KRAMAN: I apologize.

21 THE COURT: So we're looking at  
22 Exhibit E -- hold on just a moment. Ms. Hufnal,  
23 do you have that?

24 MS. HUFNAL: I do have it, Your

1 Honor.

2 THE COURT: Go ahead,  
3 Mr. Bovenkamp.

4 MR. BOVENKAMP: So it's  
5 particularly Exhibit E that you have, it's  
6 Section 5.1 which is the appendix of Dr. Jones'  
7 expert report.

8 THE COURT: Right.

9 MR. BOVENKAMP: And right there  
10 from paragraphs 186 through appears to be 208,  
11 and there is some things in there other than  
12 Window Servers, there is some share point things  
13 related in there. He's basically provided an  
14 analysis of based upon this storing of the data  
15 on Microsoft servers, how did those things get  
16 distributed. This goes back again to the  
17 software being distributed both in the United  
18 States and being distributed elsewhere. Certain  
19 servers of Microsoft depending on where they're  
20 located serve certain countries.

21 So what he's discussing here is  
22 the fact that based upon the information that's  
23 stored, in other words, made by Microsoft stored  
24 in these servers, that's the act of

1 infringement, based upon those acts of  
2 infringement, it's then distributed, i.e., sold  
3 by Microsoft throughout the country.

4 So Bone then takes that analysis  
5 in his analysis that we've discussed at length  
6 here today and otherwise is based upon those  
7 acts of infringement.

8 THE COURT: All right. This  
9 started with me asking, do you have a damages  
10 theory associated with this?

11 MR. BOVENKAMP: Yes, Your Honor.

12 THE COURT: So tell me about the  
13 damages theory. Where does Dr. Bone say hey, I  
14 have had discussions with Dr. Jones, and this is  
15 the damages attributed to the fact that  
16 Microsoft not selling it and not offering  
17 servers to third parties, but Microsoft having  
18 IIS and having ARR is infringing and this is how  
19 much money that's worth. What do you got on  
20 that?

21 MR. BOVENKAMP: I'll defer to some  
22 extent to Mr. Campbell who may be able to point  
23 to more specifically portions of his report, but  
24 at a high level the analysis is the same for

1 Dr. Bone --

2 THE COURT: How could that  
3 possibly be the case, Mr. Bovenkamp? How could  
4 it be the case that having ruled on summary  
5 judgment that you don't have a direct  
6 infringement case in offering the services of a  
7 third party, that the existence of this stuff on  
8 the Microsoft server by itself is still all the  
9 same. It is the same.

10 MR. BOVENKAMP: Because  
11 necessarily, Your Honor --

12 THE COURT: The damages are the  
13 same.

14 MR. BOVENKAMP: Necessarily before  
15 the stuff gets sent and implemented by the  
16 customer, it exist.

17 THE COURT: I know it exist, I  
18 mean, nobody is disputing that it exist. What  
19 I'm trying to get from you is a logical argument  
20 that can actually support the assertion that  
21 Dr. Bone's existing damages report will support  
22 the same number for damages with none of the  
23 third-party services in it as it did when it was  
24 supposedly taking account of damages for all of

1        what you were saying Microsoft sold, because  
2        what you're really saying is if I accept that,  
3        when Dr. Bone's said this is how much it's worth  
4        to sell this stuff to third parties, that he was  
5        just full of it, that it didn't mean anything,  
6        that is really worth nothing, it adds nothing to  
7        what Microsoft would have to pay in the way of  
8        damages if it sold nothing to anybody, that's  
9        what you're telling me, and that's pretty hard  
10       to swallow.

11                    MR. BOVENKAMP: I don't think  
12       that's what I'm telling you. What I'm telling  
13       you is alternative is probably too strong of a  
14       word to use it, but there is mutually exclusive  
15       theories that are being presented. There is  
16       claims that covered a method of infringement.  
17       There is claims that cover a computer readable  
18       medium. And Mr. Bone is not going to get -- if  
19       he went to the stand and opined, oh, Microsoft  
20       gets value for selling it to third parties, but  
21       they also get some sort of value for having it  
22       on their servers, he would probably be laughed  
23       out of court on those basis. But those two  
24       things are intricately related. So what I'm



1 saying is that it's almost impossible to  
2 separate between what's on the server and their  
3 sales and the inducement or acts of contributory  
4 infringement that were the focus of the case  
5 prior to the survey being excluded.

6 So in other words, when the survey  
7 was still in the case, I think it's fair to say  
8 that his theory is on the software, and so the  
9 software is what matters. When the survey was  
10 in the case, the infringement proof in the case  
11 was focused on the use. When the survey is not  
12 in the case, we still have the exact same  
13 software as being sold to customers and being  
14 used by customers, but now how they use it is  
15 still -- isn't relevant to some degree. He  
16 still has to take account, he still has to  
17 apportion in his damages theory, he still has to  
18 do the magic that damages experts do, but the  
19 fact of the matter is that in order to enable  
20 them to sell exactly the same software they sold  
21 to customers, it had to be put on their server.  
22 That's how they designed their system, put it on  
23 their servers, distribute it to everybody. So  
24 their sales that he opined on in both cases stem

1 from that.

2 THE COURT: So do I hear you  
3 saying, maybe I'm misunderstanding and if I am,  
4 I apologize. Do I hear you saying to me yeah,  
5 we understand that Dr. Isaacson's report is out,  
6 we don't agree with it, but it's out, that's for  
7 another day, but we should still get -- we  
8 should still be able to argue to the jury that  
9 the value of having this is the same because  
10 even though we can't talk about what's going on  
11 with third parties because that's out of the  
12 case, we're still -- I apologize, should I let  
13 Mr. Campbell take the ball?

14 MR. BOVENKAMP: Perhaps.

15 MR. CAMPBELL: Because I feel like  
16 there is something that's way off, because it  
17 would make no sense to have it be otherwise.

18 So it is still in the case that  
19 Microsoft sales of this product are an act of  
20 direct infringement. I don't hear them saying  
21 they don't have fair notice of that.

22 So now Mr. Bone has got to do a  
23 damages analysis and he understands from  
24 Mr. Jones' they infringe from making and they

1       infringe from selling.

2                   THE COURT:   Right.

3                   MR. CAMPBELL:   The value of them  
4       selling is the same as the value of them making,  
5       because you're not -- it would be pretty  
6       ridiculous, although maybe there is a fact  
7       there, to say there is some great value for  
8       making it and throwing it on their servers,  
9       that's an act of infringement.

10                  THE COURT:   Right, that's what I  
11       hear them saying, you don't have any damages  
12       theory associated with them just making it, what  
13       you got is a sales theory.   Right?

14                  MR. CAMPBELL:   I don't understand  
15       -- they're one in the same.   No damages expert  
16       teases those apart because you would say the  
17       value of them making is the value they get from  
18       then selling, but those happen to be under 271  
19       two separate acts of infringement, but the value  
20       of them is the same value.

21                  THE COURT:   It's the same value.  
22       I need you to respond -- well, you know what,  
23       Ms. Hufnal, instead of me assuming what you're  
24       going to say, why don't you say what you're

1 going to say, and then I can see -- ask  
2 Mr. Campbell for a response. Your response to  
3 what he's just said, please.

4 MS. HUFNAL: Yes. I think I have  
5 to disagree that we do not think that  
6 Microsoft's sale of IIS and separate providing  
7 of the download for ARR is an act of direct  
8 infringement. That is what we're saying. In  
9 their brief they have coined it as make, but  
10 whether you call it make or sale, that was never  
11 disclosed or provided to us as a basis. It was  
12 always -- it would be like me, I'm a company, I  
13 sell widget A and I sell widget B. If widget A  
14 is on shelf three and widget B is on shelf one  
15 and the claim is directed to the combination, a  
16 combination of A plus B, how am I a direct  
17 infringer by selling these two things  
18 separately? I may be an indirect infringer,  
19 that's the theory of indirect infringement.  
20 What I'm saying is we were never put on notice  
21 that the act of just having IIS in a server,  
22 whether it's just by making, which is the very  
23 clear one, it seems we're backing away from that  
24 now, but even selling or providing it, that is

1 not direct infringement. That was not the  
2 theory of the case, it was indirect infringement  
3 when the customers put them together to meet all  
4 of the claim limitations.

5 MR. CAMPBELL: It's absolutely  
6 direct infringement. Just because you split it  
7 up into two things doesn't get you out of the  
8 making and selling of those things. That's an  
9 act of infringement.

10 THE COURT: Well, here is what's  
11 happening before my very eyes. I'm getting a  
12 summary judgment argument before my very eyes.  
13 So this is -- is there anything else on our  
14 table today? Any other issues we got to deal  
15 with? I'm seeing heads shake and I don't think  
16 sos coming all over the courtroom. So let's  
17 just get it on the record.

18 Mr. Bovenkamp, is there anything  
19 else?

20 MR. BOVENKAMP: There is nothing  
21 else, Your Honor, besides what we're talking  
22 about.

23 THE COURT: All right.

24 Ms. Brooks.

1 MS. BROOKS: No, Your Honor,  
2 nothing else.

3 THE COURT: So this is the last  
4 thing we're dealing with.

5 Go ahead, Ms. Hufnal, there is  
6 clearly something you want to say. I'll give  
7 you a few more words.

8 MS. HUFNAL: In preparing for  
9 this, Your Honor, this is actually what I feared  
10 would happen, because it's not fair to us for  
11 not having an opportunity to brief this. The  
12 MIL that we brought that we were not put on  
13 notice that this was a theory in the case. And  
14 the first time it was laid out in any kind of  
15 notice was in their opposition to our motion in  
16 limine, so --

17 THE COURT: How did you know to  
18 file a motion in limine?

19 MS. HUFNAL: Because when Your  
20 Honor ruled on no indirect infringement before  
21 we knew they were going to supplement their  
22 report, now the indirect infringement was out,  
23 we said surely you all are not trying to put in  
24 front of the jury that big total revenue number

1       because you have no way of apportioning it.  
2       This was at the meet and confer. And they said  
3       we are. We're going to do a supplemental  
4       report, and that's when this came out.

5               THE COURT: So I guess this -- I'm  
6       already going to be taking a look at some  
7       additional briefing in the IBM case and you guys  
8       on the Parallel Networks are going to be double  
9       duty. On the same schedule, I want this thing  
10      briefed. All right? You go ahead, it's a  
11      little bit different on this go around.

12             If what you're saying to me is  
13      hey, we got a motion for summary judgment, if  
14      this is in the case then it's not fairly in the  
15      case, timeliness and substantively it makes no  
16      sense, you go ahead and brief it, you file it by  
17      a week from today. You file your responsive  
18      brief a week after that. You got three days to  
19      file your reply brief after that, Ms. Hufnal.  
20      I'll take it under advisement.

21             And, you know, the very fact that  
22      we're talking about this now makes me  
23      suspicious, I got to tell you Parallel Networks  
24      people, makes me suspicious, that --

1 MR. CAMPBELL: Your Honor, can I

2 --

3 THE COURT: No, Mr. Campbell,  
4 restrain yourself. All right? Makes me  
5 suspicious that there is more than -- that maybe  
6 there is a little fire behind the smoke I see in  
7 the courtroom right now when the Microsoft  
8 people say we didn't know this thing was coming,  
9 makes me worry that there is something to what  
10 they're saying.

11 I can't sort it out and I'm not  
12 going to try to sort it out in the courtroom  
13 today. All I know is there is a lot more than  
14 motion in limine that's erupted in the courtroom  
15 this afternoon.

16 MR. CAMPBELL: I apologize, but if  
17 you're suspicious I have to speak as an officer  
18 of the court.

19 THE COURT: You don't have to.

20 MR. CAMPBELL: But I feel like I  
21 have to. As an officer of the court, there was  
22 nothing -- we weren't hiding anything. I'm  
23 really confused by the argument. There was  
24 nothing hidden.



1 THE COURT: I'll give you the  
2 argument, Mr. Campbell. Here is the argument.  
3 The argument is we had full summary judgment  
4 briefing in this case. There was plenty of  
5 stuff teed up. If we had known that this was  
6 actually an argument that was going to be made,  
7 it would have been made as part of our summary  
8 judgment argument because we don't believe that  
9 there is a direct infringement from just having  
10 these two different things out there. All of  
11 the discussion in the case was about these  
12 things operating together to do load balancing  
13 and send things out. The existence of the two  
14 of them in our system unrelated to the combining  
15 of them by the customers once they get them,  
16 just the existence of them by themselves as a  
17 making constituting in and of itself an  
18 infringement, we didn't know about it or we  
19 would have talked about it. It's not in his  
20 report in any meaningful sense. We would have  
21 talked about.

22 I don't find that argument hard to  
23 grasp. I understand you disagree with it, but  
24 at this point you can both express your surprise

1 in papers. Saying I'm little suspicious is not  
2 casting aspersions on your honor, Mr. Campbell,  
3 it's just saying it looks to me like this is  
4 lawyers doing what lawyers do, which is after  
5 they get a decision they don't like saying I can  
6 still win, I can still win if they say X, Y and  
7 Z. So now you're saying X, Y and Z, so we'll go  
8 ahead and hear what you have to say, get the  
9 briefing in to me, I'll -- I have looked at  
10 this, I'll look at it again, I'll look at it in  
11 the context of your response to their summary  
12 judgment motion, and we'll take it on.

13 I expect they'll be pointing out  
14 all the stuff that shows hey, this came out of  
15 left field and I'm sure you'll be pointing out  
16 all the stuff that says oh, no, in response to  
17 their contention interrogatories, we said this.  
18 In response to deposition questions we said  
19 this. In response to their other discovery  
20 request for production of documents and in our  
21 expert reports we said these things all of which  
22 should have told them this was a theory that was  
23 in the case. You'll have a chance to do that,  
24 I'll take a look at it and give you a ruling.

1                   Good enough. Thanks. Thanks for  
2                   your time today. I'll look forward to getting  
3                   the documents from you folks and I'll get you a  
4                   ruling promptly so that people will know what,  
5                   if anything, of this last piece of our  
6                   discussion is still in the case.

7                   Thanks. We're in recess.

8                   (Court recessed at 3:15 p.m.)  
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1 State of Delaware )  
2 )  
3 New Castle County )  
4

5 CERTIFICATE OF REPORTER  
6

7 I, Dale C. Hawkins, Registered Merit  
8 Reporter, Certified Shorthand Reporter, and Notary  
9 Public, do hereby certify that the foregoing record,  
10 is a true and accurate transcript of my stenographic  
11 notes taken on March 13, 2017, in the above-captioned  
12 matter.  
13

14 IN WITNESS WHEREOF, I have hereunto set my  
15 hand and seal this 13th day of March 2017, at  
16 Wilmington.  
17

18  
19 /s/ Dale C. Hawkins

20 Dale C. Hawkins, RMR  
21  
22  
23  
24

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